Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/17866/2019 (V)**

THE IMMIGRATION ACTS

Heard by Skype for business
On the 26 February 2021

Decision & Reasons Promulgated
On 09 March 2021

Before

UPPER TRIBUNAL JUDGE REEDS

Between

KRISHAN KUMAR
(ANONYMITY DIRECTION NOT MADE)

Appellant

AND

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Zeb, of City Law Practice acting on behalf of the appellant.
For the Respondent: Mr Diwnycz, Senior Presenting Officer

DECISION AND REASONS

Introduction:

1. The appellant appeals with permission against the decision of the First-tier Tribunal Judge Lawrence (hereinafter referred to as the "FtTJ") promulgated on the 10 January 2020, in which the appellant's appeal against the decision to refuse his human rights application dated 30 September 2019 was dismissed.

2. The FtTJ did not make an anonymity order and no application was made for such an order before the Upper Tribunal.

3. The hearing took place on 26 February 2021, by means of *Skype for Business*. which has been consented to and not object1d to by the parties. A face- to- face hearing was not held because it was not practicable, and both parties agreed that all issues could be determined in a remote hearing. The advocates attended remotely via video as did the appellant and his spouse who were able to see and hear the proceedings being conducted. There were no issues regarding sound, and no technical problems were encountered during the hearing and I am satisfied both advocates were able to make their respective cases by the chosen means.

4. I am grateful to Mr Zeb and Mr Diwnycz for their clear oral submissions.

Background:

5. The appellant is a national of India. He entered the United Kingdom on 1 January 2012 with entry clearance as a Tier 4 student valid until 30 May 2013.

6. On 24 May 2013 he applied for further Tier 4 leave which was refused on 24 June 2013. The appellant was given a right of appeal against this decision, but his appeal was dismissed by the FtT on 21 May 2014. Permission to appeal the decision was refused both by the FtT and by the Upper Tribunal. The appellant was appeal rights exhausted on 3 October 2014.

7. On 29 October 2014, the appellant made an application for leave outside of the rules, but this was refused with no right of appeal on 17 January 2015. A reconsideration was requested and a refusal with an in country right of appeal was given on 9 October 2015.

8. On 20 October 2015, the appellant lodged an appeal against this decision, but it was dismissed by the FtT on 25 July 2015. There is no copy decision in the papers.

9. The appellant and his partner first made contact on social media in 2015. They kept in touch with each other and formed a friendship. In or about September 2015 they first met and began their relationship travelling between their respective homes. In 2017 the appellant proposed to the sponsor and on 22 April 2017 they married in a civil ceremony and a Hindu religious ceremony took place on 30th of June 2017.

10. On 15 December 2017 he was served with a RED.0001 and an IS 96.

11. In January 2018 permission to appeal to the First-tier Tribunal was refused and in May 2018 permission to appeal to the Upper Tribunal was refused. The appellant became appeal rights exhausted for a second time.

12. On 24 May 2018 he made an application for leave to remain on the basis of his family and private life (which related to his family life with his British partner) which was refused in a decision dated 8 August 2018. It was refused under paragraph 353 of the Immigration Rules and as it was not a fresh claim no right of appeal was granted.

13. The appellant began judicial review proceedings lodged on 15 October 2018 but permission to proceed was refused on 2 April 2019.

14. On the 30 September 2019 he made a further human rights application in an application for leave to remain in the UK on the basis of his family life with his partner and on the basis of his private life.

15. The basis of the application is set out in a letter from the appellant's representatives. It was stated that the appellant and his partner were undergoing infertility treatment and that the appellant was required to attend the appointments alongside his partner. It was stated that if relocated to India, the appellant's partner would not be able to receive the same or similar treatment as in the United Kingdom. It was further stated at page 4 that the appellant's family in India would be unable to support his reintegration there because they came from a poor background. They had resources to support themselves and "have moved on with their lives and are accustomed to not having our client there." It was also stated the job market was very hard and it would be "nearly impossible for our client to find adequate employment." Reference was made to their relationship as genuine and subsisting and that they were heavily dependent on each other. The submissions stated that the relocation of the appellant from the United Kingdom would be disproportionate and that the circumstances were compelling and compassionate as he could not leave his partner alone in the United Kingdom. Thus there would be "insurmountable obstacles" for the appellant and the sponsor to start a new life in India.

The decision letter:

16. The application was refused in a decision made on the 17 October 2019. The decision letter states that the appellant had made a human rights claim in an application for leave to remain in the UK under Appendix FM to the Immigration Rules on the basis of his family life with his partner.

17. It was accepted that the eligibility relationship requirement was met (on the basis that that the appellant was in a genuine subsisting relationship).

18. The reasons given for refusing the application can be summarised as follows. The respondent considered his application under paragraphs R-LTRP of Appendix FM but considered that he could not meet the eligibility immigration requirement (paragraphs E-LTRP 2.1 -2.2) because he was in the UK in breach of immigration laws as an overstayer and paragraph EX1 did not apply.

19. The respondent considered whether the appellant would be exempt from meeting certain eligibility requirements of Appendix FM because paragraph EX1 applied. It was accepted that the appellant had a genuine and subsisting relationship with his partner who was a British Citizen. However the respondent did not accept that there were any insurmountable obstacles in accordance with paragraph EX2 of Appendix FM which means a very significant difficulties which will be faced by the appellant or his partner in continuing their family life together outside of the UK, and which could not be overcome or entail very serious hardship for him and his partner.

20. The respondent took into account the points raised in the application, including that their parents did not approve of the relationship and that they were currently undergoing fertility treatment in the UK. However, it was not accepted that they were "insurmountable obstacles" in accordance with paragraph EX2. The respondent considered that it was open to them to continue their relationship in India and that they had not raised any compelling circumstances preventing them from doing so.

21. Therefore paragraph EX1 did not apply.

22. His application was considered under the private life rules under Paragraph 276 ADE, where it was noted that the appellant was a national of India who had entered the UK in January 2012. He had lived in the UK for 7 years and it was not accepted that he lived in the UK continuously for 20 years; he was not between the ages of 18 and under 25 having lived in the UK for more than half his life and was over the age of 18 and therefore could not meet the requirements of paragraph 276 ADE(1 (iii)(iv) and (v). As to paragraph 276 ADE(1) (vi) the respondent did not accept that there would be very significant obstacles to his integration into India if required to leave the UK because he resided in India for the majority of his life. It was considered that he would have retained social, cultural, and linguistic connections to India during his time in the UK. Consequently, he failed to meet the requirements of the Immigration Rules.

23. The respondent did not consider that there were any "exceptional circumstances" to warrant a grant of leave to remain and considered the issues that had been raised as to why it would be unjustifiably harsh for him to return to India with his partner. The respondent took into account the basis of the application and that his partner could not be expected to return to India due to their parents not agreeing with the relationship, but that this was not

considered to be exceptional as it was open for them to continue their family life outside of the UK. Reference was made to this issue being addressed in a previous refusal notice (although neither party provided the previous refusal notice to the FtTJ in the present appeal). The respondent took into account the claim that they had started fertility treatment in the UK but concluded that fertility treatment was available in India and it would be open for the couple to continue that treatment there.

24. It was noted that the appellant commenced a relationship in the knowledge that his immigration status in the UK was as an over stayer and that he had no legitimate expectation to remain in the United Kingdom indefinitely and therefore from the outset, both parties should have been aware of the possibility the family life might not be able to continue in the UK. Reference was made to other aspects of his claim being considered in the decision of * August 2018 and appeal determination of 21 May 2014.

25. Therefore the respondent did not find that there was any evidence to demonstrate that there were any" exceptional circumstances" established in his case.

The appeal before the First-tier Tribunal:

26. The appellant's appeal against the respondent's decision to refuse leave came before the First-tier Tribunal (Judge N. Lawrence) on the 24 December 2019.

27. In a determination promulgated on the 10 January 2020, the FtTJ dismissed the appeal on human rights grounds, having considered that issue in the light of the appellant's compliance with the Immigration Rules in question and on Article 8 grounds. The judge heard evidence from the appellant and also heard evidence from his partner.

28. In summary, the First-tier Tribunal found that the appellant could not meet the requirements for a grant of leave to remain under Appendix FM of the Immigration Rules; specifically he could not meet the eligibility immigration requirements of the rules as he had been an overstayer and failed to meet E-LTRP 2.2 (see paragraphs [5-6]).

29. By reference to his relationship with his partner, the judge accepted that he was in a genuine and subsisting relationship with his partner.

30. At paragraphs [6-15] the FtTJ addressed the issue of "insurmountable obstacles". The FtTJ noted that the dispute centred on the sponsor's need for fertility treatment and that it was the appellant's case that he needed to remain in the UK throughout the process. It had been argued on behalf of the appellant that if he returned to India it would be likely to interrupt the continuity of treatment and that would be detrimental to the process.

31. At [8] the FtTJ set out that the appellant, the sponsor, and their legal representative accepted that treatment would be available in India but that they questioned the quality of that treatment available. In support of that submission, reliance was placed on a report from a GP set out in the bundle at pages 24 to 27. The FtTJ considered the contents of that report and the assertion made that "IVF treatment being carried out in India is not a feasible option for this couple for a number of reasons". The judge went on to consider the reasons given in that report; the first being that the appellant's claim was that his family in India are estranged from him and that he shunned by his mother for his choice in marrying the sponsor and it was against her will. Secondly, it was stated that the couple did not have family support, anywhere to live and thirdly, the appellant is a victim of verbal, financial and emotional abuse at the hands of his family and he had self-harmed as a consequence of the abuse. The FtTJ concluded that none of the report challenged the availability of treatment or its quality and whereas the appellant and his wife questioned the quality of treatment in India, in fact the expert report did not. In any event the judge reached the conclusion at [8] that he had not been provided with any evidence that the GP was an expert on the Indian healthcare system.

32. At [9] the FtTJ went on to consider whether the appellant's partner had in fact begun IVF treatment. The judge observed that the GP had stated that the appellant's partner was to start IVF treatment in the spring of 2020 and that it was in the "very initial stages and what the treatment will entail depends upon her first appointment with the IVF specialist. The treatment does involve that the male partner is to undergo sperm analysis in the initial stages at the very least. Thus, the appellant's presence is pivotal to the sponsors IVF treatment progressing." The judge found that the GP did not develop what he or she meant by "the appellant's presence is pivotal."

33. Based on that evidence, the judge found at [10] that the sponsor had not yet commenced IVF treatment and that it would not be until the spring of 2020 and therefore there would be time for the appellant and his partner to relocate India and commence treatment there. He therefore concluded that that was not evidence of any "insurmountable obstacle" in adopting that course of action.

34. As to whether there were other insurmountable obstacles, the judge accepted that the appellant's partner was a British national. Whilst it was submitted that she was entitled to receive IVF treatment on the NHS, the judge found that the respondent's decision did not impinge on the sponsors entitlement as it would be open to the appellant to return to India and to make the appropriate entry clearance application to return to the UK. IVF treatment could then commence.

35. The judge also found that if the couple did not wish to wait they could travel to India and receive treatment there.

36. The FtTJ considered the evidence where it was said the appellant's family in India were estranged as a result of them getting married. The judge noted that

India was a large country with over a billion people and that Punjabi and Bengali (the respective languages spoken by both parties) was spoken in all parts of India and more commonly in north India. In addition, both spoke English which is a language of India and spoken in every major city. Thus the judge concluded that they could relocate any part of India and continue to enjoy "family life".

37. As to whether the appellant's partner had family in India, the judge set out the evidence at [13]. He recorded that initially the sponsor said "maybe" but then said that she did not have any family in India. The judge concluded that her evidence started off by being vague saying that she may have family in India but when asked to be clear she denied having any relatives in India. The judge found that that affected her credibility.

38. The FtTJ concluded that the evidence was insufficient to meet the high test for insurmountable obstacles in paragraph EX1(b) of the rules because there were no insurmountable obstacles to family life continuing outside of the United Kingdom. The judge found that the appellant could not meet the requirements of Appendix FM.

39. As to paragraph 276ADE, the judge took into account his length of residence since 2010 (this should be 2012) but he could not meet the requirements as to length of residence. As to paragraph 276 ADE(1) (vi) and whether there were very significant obstacles, the judge considered this issue in the context of the legal authorities. The "very significant obstacle" advanced on behalf of the appellant related to his mental health (see paragraph 21). It was submitted on behalf of the appellant that he had self harmed in the past and that he had mental health issues which was likely to impinge on his ability to integrate in India. The judge noted that he had not been provided with any expert report on the appellant's mental health and that the GP had stated that the appellant had shown him/her "scars on his left wrist" and that it had been reported as a result of verbal abuse. However the doctor had not provided any evidence of alternative causes of the scarring and in any event, if the appellant had been suffering from mental health problems, there would be psychiatric, psychological, and counselling services available in India (see paragraph 21 and 24). The judge also considered this in the alternative under Article 3 but concluded that treatment would be available to the appellant in India.

40. Additionally at [28] the FtTJ took into account that the appellant retained his language ties (speaking Punjabi) and there was no evidence that he had lost contact with his culture language or religion and that he would be "enough of an insider in terms of understanding how life in society is carried on" so that he could participate in it.

41. The FtTJ went on to consider the proportionality of the appellant's removal under Article 8 of the ECHR but concluded that it would not be a

disproportionate interference with his right to respect for private and family life.

42. The FtTJ took into account that the appellant and her partner could not show compliance with the Immigration Rules (Paragraph EX1 (b) as regards insurmountable obstacles and paragraph 276ADE). The appellant had been in the UK unlawfully and that he could not meet the eligibility requirement. At the date of the hearing he could not meet the financial requirements (at [25]).

43. When considering the Section 117 public interest considerations, the FtTJ that took into account that the appellant spoke English (at [15]) and that at the date of the application there was evidence that the appellant had been financially supported by his partner.

44. He concluded that the appellant and her partner established a private life together when both parties were aware that the appellant's immigration status was precarious (at [25]). He therefore attached little weight to those factors.

45. The judge at [25] addressed the submission made by the appellant's legal representative that there was no public interest in the case to require the appellant to leave the UK to make an entry clearance application. Whilst the decision in Chikwamba was referred to, the judge found that that was a decision which predated the changes brought to the Article 8 considerations and the public interest considerations set out in section 117B. He considered that the decision in Chikwamba had to be read in conjunction with the authorities he had referred to in paragraph 13 and the public interest considerations. He did not find that the decision assisted the appellant in establishing that there was no public interest in his removal given that he could not demonstrate compliance with the Rules.

46. The judge finally concluded at [29] that when considering the relevant factors the public interest of the maintenance of immigration control applied and the judge found that the respondent's decision was not a disproportionate interference with the appellant's family and private life. He concluded at [29] that whilst it was not necessary to find "exceptional circumstances" and that "exceptional does not mean unusual or unique", when taking the appeal outside the rules they would have to be strong enough circumstances to outweigh the public interest in maintaining proper immigration control (applying Agyarko paragraph 57). He concluded that he had not been provided with evidence of any such circumstances. The FtTJ therefore dismissed the appeal.

47. Permission to appeal was issued on the 21 January 2020 and on 1 April 2020, permission to appeal was granted by FtTJ Davies stating:-

> "The grounds suggest the judge made an error of law in that he did not properly consider the issue of proportionality. It is arguable that by not asking himself the questions raised by Lord Bingham in the case of Razgar he has not properly considered the issue of proportionality.
> The judge's reference to the burden and standard of proof does not appear to address the issues highlighted by Lord Bingham in the case of Razgar. The grounds and the decision disclose an arguable error of law."

The hearing before the Upper Tribunal:

48. In the light of the COVID-19 pandemic the Upper Tribunal issued directions on the 13 July 2020, inter alia, indicating that it was provisionally of the view that the error of law issue could be determined without a face- to- face hearing. Following the parties submitting their written submissions on 9 October 2020 directions were given for a remote hearing to take place and that this could take place via Skype. Both parties have indicated that they were content for the hearing to proceed by this method. Therefore, the Tribunal listed the hearing to enable oral submissions to be given by each of the parties with the assistance of their advocates.

49. Mr Zeb on behalf of the appellant relied upon the written grounds of appeal and the written submissions dated 27 July 2020.

50. There was a written response filed on behalf of the respondent dated 12 August 2020.

51. I also heard oral submission from the advocates, and I am grateful for their assistance and their clear oral submissions.

The grounds and submissions:

52. It is submitted on behalf of the appellant that the FtTJ failed to carry out a proportionality assessment as set out in the decision of Razgar. The removal of the appellant would not be proportionate as the appellant was not a bad character and not a burden on the state. Applying the structured approach in *TZ (Pakistan and PG India) v SSHD* [2018] EWC Civ 1109, it is submitted that the requirements under the Immigration Rules are met and there is no public interest in his removal. In the alternative, there are exceptional/compelling circumstances and considerations relevant to a wider Article 8 proportionality assessment. The weight is in favour of the appellant which makes his removal disproportionate, as it envisages a family split particularly when the parties are undergoing IVF treatment which requires both of them to attend medical appointments, disruption to which has the potential to jeopardise a treatment underway.

53. It is further submitted that the judge adopted a "very strict hostile approach" when applying the insurmountable obstacles test. By reference to paragraph 11, the judge stated that the appellant could leave the UK alone and make an entry

clearance application and IVF treatment can commence then. The judge made an error because the documentary evidence indicated that the process of IVF had already begun, and that the appellant and the sponsor had attended the appointments for treatment. The appellant cannot leave the treatment halfway and go to India. Due to the sponsor's health issues she is currently earning less than the required financial requirements of £18,600. If the appellant leaves the UK goes to India he cannot make an application for entry clearance. The judge failed to give consideration to the impact of disruption to the ongoing IVF treatment.

54. It is further submitted that the judge did not give proper consideration to the report of the GP who stated that IVF treatment in India is not feasible.

55. It is further contended that the appellant has demonstrated that there are very significant obstacles to his integration to India for the purposes of paragraph 276ADE (1) (vi) owing to issues of lack of employment, finances and return his mental health state and possible risks in the appellant's family.

56. In his oral submissions, Mr Zeb submitted that the judge had not address the difficulties for the sponsor and the appellant to return to India in the light of the receiving treatment for IVF. The parties could not be expected to stop treatment which they had started in the United Kingdom and start again in India which would be a breach of family life. As they are in a genuine and subsisting relationship, the FtTJ's error was material and on the submission alone the decision should be set aside.

57. Mr Zeb submitted that the judge failed to address the issue of proportionality and that the judge had failed to strike a fair balance and had given inadequate reasons on the issue of insurmountable obstacles which again would lead to the hearing to be remitted to a different FtTJ. Mr Zeb referred to the decision in *Lal* and that the judge had not taken into account the sponsor who was a British citizen and was entitled to free IVF treatment and that she would be deprived of this if she were required to live in India with the appellant and this was an insurmountable obstacle to the appellant and the sponsor establishing family life outside of the UK.

58. Mr Zeb further submitted that the appellant could not meet the financial requirements and thus the risk would be if he were to live in India they would be separated for an indefinite period. He invited the Tribunal to set aside the decision and remit the appeal to another FtTJ.

59. Mr Diwnycz relied upon the written submissions dated 12 August 2020 where the respondent had cited the decision of *Agyarko and Ikug*a [2017] UKSC 11 and that the Supreme Court had established that the "insurmountable obstacles" test in section EX of Appendix FM of the Immigration Rules is a stringent one with a high threshold (citing paragraphs 43 and 44 of that decision). It is submitted that whilst the judge did not refer to it, he properly applied the

demanding test at paragraphs 6 – 13 and found that the appellant and his wife could pursue "many options" one of which is a continuation of their family life in India. Other options considered by the judge were that the appellant could apply to the UK authorities in India for entry clearance to return to the UK, either after his wife received fertility treatment in India before she receives a treatment in the UK (paragraphs 11 and 25).

60. The respondent submitted that the main obstacle advanced by the appellant to the continuation of family life in India with his wife's wish to undertake fertility treatment in the UK (see paragraph 7). The judge considered this issue adequately at paragraph 7 – 11 and the medical evidence before the judge was that whilst the process had begun, the treatment itself was not due to begin until the spring of 2020. It was therefore open to the judge to find the proposed fertility treatment did not constitute an insurmountable obstacle to the continuation of family life between the appellant and his wife in India. In any event, at paragraph 73 of Agyarko, the court agreed with the Court of Appeal that Ms Ikuga could not possibly meet the "insurmountable obstacles" test on the basis that she was undergoing fertility treatment in the UK.

61. It is submitted that the judge also considered another obstacle advanced by the appellant to the continuation India of his family life namely the appellant was a stranger and his family (see paragraph 12). The judge gave adequate reasons finding that that did not constitute an insurmountable obstacle.

62. As to paragraph 276 ADE(1) (vi) the respondent submits that the FtTJ considered this issue citing the relevant case law at paragraph 16 – 20. As required by the decision in *Parveen*, the judge assessed the obstacles integration in which the appellant relied, namely his mental health at paragraph 21 – 24.. The judge properly applied the *Kamara* test to the factual circumstances.

63. As regards article 8, the respondent submits that the judge properly considered Article 8 outside of Immigration Rules and properly directed himself to the test approved by the Supreme Court in *Agyarko*. In summary, it was submitted that having noted the appellant was an oversteer in the UK and they did not meet the immigration rules, the judge properly took into account the public interest considerations. The judge also attached importance to effective immigration control. In the circumstances it was open to the FtTJ to find there were no compelling circumstances to outweigh the public interest in the proportionality balancing exercise.

64. At the conclusion of the hearing I reserved my decision which I now give.

Discussion:

65. The first ground advanced on behalf of the appellant is that the FtTJ adopted "a very strict hostile approach" when applying the insurmountable obstacles test

(I refer to page 1 of the grounds of permission and page 3 of the written submissions).

66. Mr Zeb on behalf of the appellant submitted that this was demonstrated at paragraph [11] of the decision and that the FtTJ failed to take into account material evidence relating to the issue of the fertility treatment. He submitted that the judge did not address the difficulties of the sponsor and in particular that she could not be expected to stop infertility treatment and the judge had failed to consider the impact of the disruption in the IVF treatment. In addition she had not been to India for 15 years. He further submitted that the FtTJ failed to take into account material evidence in the form of the GP report which was relevant to the issue of IVF treatment and the difficulties that the parties would face.

67. Having considered the submissions made on behalf of the appellant, I am satisfied that the judge did not fall into error in the way that has been asserted.

68. The FtTJ identified in his decision that the issue in dispute centred around the sponsor's need for fertility treatment (at paragraph [7]). The FtTJ set out the case advanced on behalf of the appellant that the appellant and the sponsor had provided evidence that the sponsor had begun the process of IVF treatment in United Kingdom and that it was funded by the NHS and that the appellant would need to remain in the UK throughout that process. It was argued on behalf of the appellant that if he returned to India, on his own or with his partner, that there would be an interruption to the continuity of that treatment which was am "insurmountable obstacle."

69. Thus the issue in dispute in this appeal centred upon EX1 and whether there were insurmountable obstacles to family life outside of the UK.

70. Paragraph EX.1. reads as follows (so far as relevant):

" EX.1. This paragraph applies if.

(a) ...; or

(b) the applicant has a genuine and subsisting relationship with a partner who is in the UK and is a British Citizen, settled in the UK or in the UK with refugee leave or humanitarian protection, and there are insurmountable obstacles to family life with that partner continuing outside the UK.

EX.2. For the purposes of paragraph EX.1.(b) "insurmountable obstacles" means the very significant difficulties which would be faced by the applicant or their partner in continuing their family life together outside the UK and which could not be overcome or would entail very serious hardship for the applicant or their partner."

71. The Supreme Court in Agyarko considered the meaning of the "insurmountable obstacles" requirement at [43] to [45] of the judgment as follows:

"43. It appears that the European court intends the words "insurmountable obstacles" to be understood in a practical and realistic sense, rather than as referring solely to obstacles which make it literally impossible for the family to live together in the country of origin of the non-national concerned. In some cases, the court has used other expressions which make that clearer: for example, referring to "un obstacle majeur" (*Sen v The Netherlands* (2003) 36 EHRR 7 , para 40), or to "major impediments" (*Tuquabo-Tekle v The Netherlands* [2006] 1 FLR 798 , para 48), or to "the test of 'insurmountable obstacles' or 'major impediments'" (*IAA v United Kingdom* (2016) 62 EHRR SE 19, paras 40 and 44), or asking itself whether the family could "realistically" be expected to move (*Sezen v The Netherlands* (2006) 43 EHRR 30 , para 47). "Insurmountable obstacles" is, however, the expression employed by the Grand Chamber; and the court's application of it indicates that it is a stringent test. In *Jeunesse*, for example, there were said to be no insurmountable obstacles to the relocation of the family to Suriname, although the children, the eldest of whom was at secondary school, were Dutch nationals who had lived there all their lives, had never visited Suriname, and would experience a degree of hardship if forced to move, and the applicant's partner was in full-time employment in the Netherlands: see paras 117 and 119.

44. Domestically, the expression "insurmountable obstacles" appears in paragraph EX.1(b) of Appendix FM to the Rules. As explained in para 15 above, that paragraph applies in cases where an applicant for leave to remain under the partner route is in the UK in breach of immigration laws and requires that there should be insurmountable obstacles to family life with that partner continuing outside the UK. The expression "insurmountable obstacles" is now defined by paragraph EX.2 as meaning "very significant difficulties which would be faced by the applicant or their partner in continuing their family life together outside the UK and which could not be overcome or would entail very serious hardship for the applicant or their partner." That definition appears to me to be consistent with the meaning which can be derived from the Strasbourg case law. As explained in para 16 above, paragraph EX.2 was not introduced until after the dates of the decisions in the present cases. Prior to the insertion of that definition, it would nevertheless be reasonable to infer, consistently with the Secretary of State's statutory duty to act compatibly with Convention rights, that the expression was intended to bear the same meaning in the Rules as in the Strasbourg case law from which it was derived. I would therefore interpret it as bearing the same meaning as is now set out in paragraph EX.2.

45. By virtue of paragraph EX.1(b), "insurmountable obstacles" are treated as a requirement for the grant of leave under the Rules in cases to which that paragraph applies. Accordingly, interpreting the expression in the same sense as in the Strasbourg case law, leave to remain would not normally be granted in cases where an applicant for leave to remain under the partner route was in the UK in breach of immigration laws, unless the applicant or their partner would face very serious difficulties in continuing their family life together outside the UK, which could not be overcome or would entail very serious hardship. Even in a case where such difficulties do not exist, however, leave to remain can nevertheless be granted outside the Rules in "exceptional circumstances", in accordance with the Instructions: that is to say, in "circumstances in which refusal would result in unjustifiably harsh consequences for the individual such that refusal of the application would not be proportionate."

72. The Supreme Court held that the requirements were Article 8 compliant, recognising that the requirements reflected the Minister's view of where the public interest lay.

73. As the Supreme Court also made clear, even where those requirements are not met, an applicant may still be granted leave if the consequences of removal result are "unjustifiably harsh". However, as the Supreme Court went on to say when looking at the grant of leave to remain outside the Rules, this will only arise in exceptional circumstances. The rationale for that approach is explained at [54] and [55] of the judgment as follows:

> "54. As explained in para 49 above, the European court has said that, in cases concerned with precarious family life, it is "likely" only to be in exceptional circumstances that the removal of the non-national family member will constitute a violation of article 8. That reflects the weight attached to the contracting states' right to control their borders, as an attribute of their sovereignty, and the limited weight which is generally attached to family life established in the full knowledge that its continuation in the contracting state is unlawful or precarious. The court has repeatedly acknowledged that "a state is entitled, as a matter of well-established international law, and subject to its treaty obligations, to control the entry of non-nationals into its territory and their residence there" (*Jeunesse*, para 100). As the court has made clear, the Convention is not intended to undermine that right by enabling non-nationals to evade immigration control by establishing a family life while present in the host state unlawfully or temporarily, and then presenting it with a fait accompli. On the contrary, "where confronted with a fait accompli the removal of the non-national family member by the authorities would be incompatible with article 8 only in exceptional circumstances" (*Jeunesse*, para 114).
>
> 55. That statement reflects the strength of the claim which will normally be required if the contracting state's interest in immigration control is to be outweighed. In the *Jeunesse* case, for example, the Dutch authorities' tolerance of the applicant's unlawful presence in that country for a very prolonged period, during which she developed strong family and social ties there, led the court to conclude that the circumstances were exceptional and that a fair balance had not been struck (paras 121-122). As the court put it, in view of the particular circumstances of the case, it was questionable whether general immigration considerations could be regarded as sufficient justification for refusing the applicant residence in the host state (para 121)."

74. In his oral submissions Mr Zeb made a general reference to the decision in Lal v SSHD [2019] EWCA Civ 1925. At paragraph 35 of that decision the Court of Appeal gave its view as to the correct interpretation of insurmountable obstacles. The Court of Appeal indicated in paragraphs 36 and 37:

> "36. In applying this test, a logical approach is first of all to decide whether the alleged obstacle to continuing family life outside the UK amounts to a very significant difficulty. If it meets this threshold requirement, the next question is whether the difficulty is one which would make it impossible for the applicant and their partner to continue family life together outside the UK. If not, the decision-maker needs finally to

consider whether, taking account of any steps which could reasonably be taken to avoid or mitigate the difficulty, it would nevertheless entail very serious hardship for the applicant or their partner (or both).

37. To apply the test in what Lord Reed in the *Agyarko* case at para 43 called 'a practical and realistic sense', it is relevant and necessary in addressing these questions to have regard to the particular characteristics and circumstances of the individual(s) concerned. Thus, in the present case where it was established by evidence to the satisfaction of the tribunal that the applicant's partner is particularly sensitive to heat, it was relevant for the tribunal to take this fact into account in assessing the level of difficulty which Mr Wilmshurst would face and the degree of hardship that would be entailed if he were required to move to India to continue his relationship. We do not accept, however, that an obstacle to the applicant's partner moving to India is shown to be insurmountable - in either of the ways contemplated by paragraph EX.2. - just by establishing that the individual concerned would perceive the difficulty as insurmountable and would in fact be deterred by it from relocating to India. The test cannot, in our view, reasonably be understood as subjective in that sense. To treat it as such would substantially dilute the intended stringency of the test and give an unfair and perverse advantage to an applicant whose partner is less resolute or committed to their relationship over one whose partner is ready to endure greater hardship to enable them to stay together".

75. The FtTJ addressed the issue at paragraphs [6]-[12] of his decision and I am satisfied that he properly considered the evidence in accordance with the law set out above and in accordance with the evidence that was advanced on behalf of the appellant.

76. Whilst Mr Zeb submits that the judge failed to have regard to material evidence in the form of the GPs report, in my judgement this is not a justified criticism of the FtTJ's decision.

77. At [8] the judge observed that the appellant, his partner, and their legal representative all accepted that IVF treatment was available in India, but they questioned the quality of that treatment. To support of this assertion, the appellant relied upon the report of a GP, Dr W. Contrary to the submissions made, the FtTJ expressly considered the GPs report and its contents and did so in the light of the assertions made that IVF treatment was not feasible for the couple in India. The FtTJ set out verbatim the reasons given by the GP; that the appellant had claimed that his family in India were estranged from him, that he was shunned by his mother of his choice in marrying the sponsor, that the couple would not have family support and nowhere to live and thirdly that the appellant was the victim of verbal, financial and emotional abuse at the hands of his family in India and had self harmed as a consequence; his family had belittled his wife.

78. As the FtTJ observed, none of those reasons given by the GP either challenged the availability of IVF treatment in India nor the quality of such treatment. In my judgement the FtTJ was correct in his assessment that he had not been provided with any evidence that the GP was an expert in the Indian healthcare

system and in particular the quality or otherwise of the IVF treatment that could be undertaken there. Nor did the GP explain why the reasons he gave would meant that IVF treatment could not be accessed.

79. More importantly, the FtTJ addressed the issue as to whether in fact the sponsor had commenced IVF treatment (see paragraphs [9]-[10] of the decision). The judge set out the evidence in the GPs report at [9] stating that the sponsor was to start her IVF treatment in the spring of 2020 and that " her treatment process is in the very initial stages and what the treatment will entail depends on her first appointment with the IVF specialist." The GP went on to state "the treatment does involve that the male partner is to undergo a sperm analysis in the initial stages at the very least. Thus, (appellant's) presence is pivotal to (sponsor's) IVF treatment progressing."

80. In my judgement, the judge was also correct in the assessment of that evidence and that the GP had not explained why the appellant's presence was "pivotal" to the IVF process when the evidence had not demonstrated the appellant's partner had properly commenced IVF treatment and would not do so until the spring of 2020. The evidence in the appellant's bundle relevant to the partner's medical history demonstrates that whilst she had been referred to the fertility clinic in July 2019, no treatment had in fact been carried out beyond an initial consultation which had taken place on 10 October 2019, two months before the hearing in December 2019 (see pages 32 and page 36). Contrary to the parties' evidence, the written documents did not set out that the appellant's partner had been given funding for IVF or that the treatment had progressed to the extent that it had properly commenced. In fact, the letter at page 32 made it plain that there were particular funding criteria of a BMI of less than 30 for assisted fertility treatment. The BMI given for the appellant's partner did not meet the criteria. As the FtTJ set out, the GPs report also stated that the appellant's partner was "waiting to undergo fertility treatment" on the basis that she was due to be seen in the spring of 2020 and that the treatment process was in the "very initial stages". In the light of that evidence, it has not been demonstrated that the judge was in error in his assessment of the GPs report or in his conclusion at [10] that she had yet to commence IVF treatment and it would not be until spring of 2020 and thus there was sufficient time for the couple to relocate to India and to commence treatment there. His conclusion that the appellant had not provided evidence of any "insurmountable obstacle" in adopting this course of action was a finding properly open to the FtTJ to make.

81. Mr Zeb sought to rely on fresh evidence that was not before the FtTJ which had been sent by email the day before this hearing. It consisted of an article dated 15 March 2013 and a medical report dated 11/1/21.

82. No application had made under Rule 15 (2A) either prior to the hearing or at the hearing itself. Mr Zeb submitted that they were important documents because they supported the appellant's case that fertility treatment had begun.

83. I make the following observations about that evidence. The admission of the further material under Rule 15(2A) of the Tribunal Procedure (Upper Tribunal) Rules 2008 is as follows.

Evidence and submissions

15. …

… (2A) In an asylum case or an immigration case—

(a) if a party wishes the Upper Tribunal to consider evidence that was not before the First-tier Tribunal, that party must send or deliver a notice to the Upper Tribunal and any other party—

(i) indicating the nature of the evidence; and

(ii) explaining why it was not submitted to the First-tier Tribunal; and

(b) when considering whether to admit evidence that was not before the First-tier Tribunal, the Upper Tribunal must have regard to whether there has been unreasonable delay in producing that evidence.

84. UT rule 15(2A) imposes important procedural requirements where the Upper Tribunal is asked to consider evidence that was not before the First-tier Tribunal. UT rule 15(2A) must be complied with in every case where permission to appeal is granted and a party wishes the Upper Tribunal to consider such evidence. Notice under rule 15(2A) (a), indicating the nature of the evidence and explaining why it was not submitted to the First-tier Tribunal, must be filed with the Upper Tribunal, and served on the other party within the time stated in any specific directions given by the Upper Tribunal; or, if no such direction has been given, as soon as practicable after permission to appeal has been granted. A failure to comply with Rule 15(2A) will be regarded as a serious matter and may result in fresh or further evidence not being considered by the Tribunal ((see appendix to decision of *Lama (video recorded evidence - weight - Art 8 ECHR)* [2017] UKUT 16 (IAC)). In the context of this appeal, there has been no Rule 15(2A) application made or any compliance with the substance of the Rule.

85. Secondly, none of that evidence had been put before the FtTJ and it is difficult to see how it could demonstrate that the judge was an error when the medical report related to events taking place over one year after the hearing itself.

86. Even if I were to admit the evidence, as Mr Diwnycz submitted, none of the evidence materially supports the appellant's case. The article relied upon is substantially out of date (dated May 2013). It is an article that refers to childless couples' resident in the UK travelling to India for fertility treatment and refers to childless British Asian couples travelling to India due to egg shortages in the

United Kingdom. The article does not demonstrate that treatment is not available in India in fact it demonstrates the opposite. Furthermore, it does not demonstrate that the quality is inferior in all clinics in India and simply refers to practices in some fertility clinics that implant multiple embryos.

87. Dealing with the medical report, it is dated 11 January 2021 following a telephone consultation that took place on 16 December 2020 and therefore is one year after the FtTJ's hearing. The contents of the letter refer to the appellant taking medication, but the content of the letter again refers to the funding criteria relevant for IVF which the appellant has not met. Consequently, that evidence does not demonstrate that the judge was in error one year earlier on the evidence that was before him. In the intervening period the position of the appellant's partner has not changed and that again the very initial stages referred to in the correspondence at pages 32 and 36, and the GPs report, has not progressed any further. Importantly, it has not been demonstrated, that the IVF treatment is at a stage where it could properly be said that there would be any disruption in the continuity of that treatment which would amount to an insurmountable obstacle to family life established outside of the UK. There was no evidence that they would not be able to transfer their medical reports/ history to India if necessary to undergo treatment.

88. In the light of the evidence that was before the FtTJ, in my judgement he was entitled to reach the conclusion that the treatment had not commenced beyond its initial stages and that it was not an insurmountable obstacle to family life being established in India. Whilst losing an opportunity at some point in the future to undertake IVF however upsetting to the appellant and his partner, is not an obstacle to the relationship continuing. The inability to access IVF treatment, although of great importance to both parties, does not create an obstacle to their relationship continuing when taking into account the evidence that was before the FtTJ.

89. It was also open to the judge to conclude on the evidence that IVF treatment was available in India (which the parties accepted at paragraph 8) and that if they did not wish to wait for treatment, that could take place in India (see paragraph 11).

90. Whilst Mr Zeb submits that the appellant is a British citizen and had not been to India for a period of time, those factors are taken into account, but the judge was entitled to reach the view that they were not "insurmountable obstacles" to family life being established outside of the United Kingdom.

91. At [12] the judge took into account the claim that the appellant's family were estranged as a result of their marriage but found that the appellant spoke Punjabi and that the sponsor spoke Bengali, both languages were spoken in all parts of India alongside English and that they could live in any part of India so that they could continue their family life. The judge also made a finding in [13]

this that the appellant's partner had not been credible in her evidence concerning the lack of family relatives that she had in India.

92. When looking at the decision as a whole, in my judgement the FtTJ gave adequate and sustainable reasons that were in accordance with the relevant case law for reaching the decision that the circumstances relied upon by the appellant and the sponsor did not amount to "insurmountable obstacles" to family life being established outside the United Kingdom.

93. The decision in Lal makes clear that it is the cumulative effects of the various factors which must be considered when assessing whether there are insurmountable obstacles to family life continuing in the Appellant's home country. The Court of Appeal also indicated that one has to look at the factors relied on in an objective sense rather than on the basis of what the appellant and/or the appellant's spouse perceive to be the difficulties and that when determining the question of whether return would entail "very serious hardship" based on the evidence which was before the FtTJ (see paragraph [43] of the judgment).

94. When looking at the decision as a whole, in my judgement the FtTJ gave adequate and sustainable reasons that were in accordance with the relevant case law and evidence for reaching the decision that the circumstances relied upon by the appellant and the sponsor did not amount to "insurmountable obstacles" when viewed cumulatively to family life being established outside the United Kingdom.

95. The grounds also submit that the appellant had demonstrated that there were "very significant obstacles" to his integration to India (paragraph 276ADE (1) (vi)), due to the lack of employment, finances on return and his mental health and possible risk from the appellant's family. Beyond stating that submission, the grounds do not address the issue in the light of the factual findings made by the FtTJ nor do the grounds give any reasons why the judge is said to have erred in law when considering that issue.

96. It is plain from reading the decision that the FtTJ addressed whether the appellant could meet Paragraph 276 AD(1) (vi) in accordance with the relevant case law and in the light of the evidence was before the Tribunal set out at paragraphs [16] – [24] of his decision.

97. The FtTJ assessed the obstacles to integration upon which the appellant relied and in particular his mental health (see paragraphs [21] – [24] where the judge set out the appellant's legal representatives' submission that the appellant's mental health would impinge on his integration in India. There was no expert report concerning the appellant's mental health beyond a reference in the GPs report (see paragraph 21). The FtTJ therefore properly observed that there was no expert evidence as to the appellant's mental health and whilst the GP referred to scars on his left wrist, it was open to the judge to take into account

that when considering the issue of causation the GP had not provided any evidence of alternative causes of the scarring. In any event, the judge was entitled to find on the evidence that the appellant would be able to access treatment in India for any mental health problems that he may have (at paragraph [24]).

98. There was no dispute that the appellant lived in India for a significant part of his life having entered the United Kingdom in 2012 and the FtTJ was thus entitled to make the finding set out at [12] and [28] that neither the appellant or the sponsor provided evidence that they had lost their continuing cultural, language and religious ties and therefore the judge was entitled to conclude as he did at [28] that the appellant (and to some extent his partner) would be enough of an "insider" with an understanding of how life in Indian society was carried on and would have a capacity to participate in it.

99. Consequently, it has not been demonstrated that the judge was an error in reaching the conclusion that there were no very significant obstacles to the appellant's integration to India.

100. The final ground advanced by Mr Zeb is that the FtTJ erred in law by failing to carry out a proportionality assessment. He submits that the judge did not apply the five- stage test in Razgar and that this was a material error of law.

101. The written submissions set out that it is contended on behalf of the appellant that the requirements of the Immigration Rules had been met and therefore there was no public interest in the appellant's removal. It has not been identified either in the written submissions, the grounds or in the oral submissions how it is said that the appellant met the Immigration Rules in the light of the factual findings made by the FtTJ.

102. In the alternative, it is submitted that there are exceptional and compelling circumstances which fall in favour of the appellant which make his removal disproportionate. Those circumstances are said to be that it would entail a family separation where the parties are undergoing IVF treatment which requires both to remain in the United Kingdom and that any disruption would jeopardise that treatment.

103. In his oral submissions, Mr Zeb submitted that the judge failed to address the difficulties of the sponsor in relation to IVF treatment and being expected to stop treatment. He submitted that the judge failed to address the issue of proportionality with that in mind.

104. I have carefully considered the submissions made on behalf of the appellant but having done so, I am not satisfied that the judge fell into error in his assessment of Article 8 of the ECHR.

105. Whilst I accept that the decision is not as well structured as it could have been, it is plain that the judge considered the appeal on the correct legal basis. Whilst

Mr Zeb submitted that the judge did not make any reference to the decision in Razgar, in my judgement that is an argument as to form and not substance. On any careful reading of the decision, it is plain that the FtTJ took into account the principles set out in Razgar. The judge proceeded on the basis that there was family life between the appellant and his partner and also that the appellant had established a private life during the time that he had been resident in the United Kingdom and that the real issue was that of proportionality. In his decision he addressed that issue and did so by applying the section 117 public interest considerations.

106. As provided by section 117A (1), Part 5A applies where a Court or Tribunal is required to determine whether a decision made under the Immigration Acts breaches Article 8 and as a result would be unlawful under Section 6 of the Human Rights Act 1998. Section 117A (2) requires the Court or Tribunal, in considering whether an interference with a person's right to respect for private and family life is justified under article 8(2), to have regard in all cases to the considerations listed in section 117B.

Section 117B states as follows: -

" **Article 8: public interest considerations applicable in all cases**

(1) The maintenance of effective immigration controls is in the public interest.

(2) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are able to speak English, because persons who can speak English-"

(a) are less of a burden on taxpayers, and

(b) are better able to integrate into society.

(3) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are financially independent, because such persons-"

(a) are not a burden on taxpayers, and

(b) are better able to integrate into society.

(4) Little weight should be given to-"

(a) a private life, or

(b) a relationship formed with a qualifying partner,

that is established by a person at a time when the person is in the United Kingdom unlawfully.

(5) Little weight should be given to a private life established by a person at a time when the person's immigration status is precarious.

(6) In the case of a person who is not liable to deportation, the public interest does not require the person's removal where-"

(a) the person has a genuine and subsisting parental relationship with a qualifying child, and

(b) it would not be reasonable to expect the child to leave the United Kingdom."

107. As regards those public interest considerations the FtTJ found that the public interest in effective immigration control was engaged (at S117B (1)). At [15] the judge took into account that the appellant spoke English and at [14] he could not meet the financial requirements. At [25] the judge considered the submission made on behalf of the appellant in relation to the public interest considerations but even if there had been financial independence in the United Kingdom alongside an ability to speak English they would be neutral factors in the analysis under Section 117 of the 2002 Act (as amended).

108. The FtTJ was entitled to place little weight upon the appellant's length of residence and his private life which was established when his stay United Kingdom had been precarious (under section 117B (5) and was entitled to place weight on his earlier assessment and findings that family life could continue in India.

109. In cases involving human rights issues under Article 8, the heart of the assessment is whether the decision strikes a fair balance between the due weight to be given to the public interest in maintaining an effective system of immigration control and the impact of the decision on the individual's private or family life. In assessing whether the decision strikes a fair balance a court or Tribunal should give appropriate weight to Parliament's and the Secretary of State's assessment of the strength of the general public interest as expressed in the relevant rules and statutes: see Hesham Ali v SSHD [2016] UKSC 60 and see R (MM and others) (Lebanon) v Secretary of State for the Home Department [2017] UKSC 10, the Supreme Court at [43].

110. In my judgement the FTTJ correctly identified that when considering the public interest the appellant could not meet the Immigration Rules either under paragraph 276 ADE based on his length of residence and in light of the factual findings that there were no very significant obstacles to his integration to India or Appendix FM, where the judge found that there were no insurmountable obstacles of family life being established outside the UK. A court must accord "*considerable weight*" to the policy of the Secretary of State at a "*general level*": *Agyarko* paragraph [47] and paragraphs [56] - [57]; and see also *Ali* paragraphs [44] - [46], [50] and [53].

111. However, at [29] the FtTJ directed himself in accordance with the law and the decision in Agyarko, that even when the requirements are not met, an applicant may still be granted leave if the consequences of removal are "unjustifiably harsh" (at [54 – 55] of that decision).

112. Given that the FtTJ had addressed the claimed compelling circumstances or those that would lead to "unjustifiably harsh consequences" which had been advanced in behalf of the appellant which consisted of the prospects of fertility treatment, the estranged family in India and his mental health, it was therefore open to the judge to reach the conclusion as he did at [29] that there were no unjustifiably harsh consequences identified that outweighed the public interest in effective immigration control. When reaching his decision the factual findings of the FtTJ were consistent with the decision in *Lal* and that it had not been established that no reasonable alternative was available for IVF treatment in India or nor were there circumstances which could amount to "very serious hardship" given that treatment would be available and whilst the sponsor was a British Citizen, she spoke the languages of India and there were no very significant obstacles to the appellant's integration to India and where both parties retained cultural and language ties.

113. I am satisfied that the FtTJ properly apply the proportionality test for an assessment outside of the rules and applied it on the circumstances of the individual case that was before him carrying out a "fact sensitive assessment".

114. As the FtTJ observed at [29] whilst it is not necessary to identify any "unique" or any "exceptional" factor (see Agyarko at [47], [60]), in my judgement it was open to the FtTJ to find that the circumstances that relate to the appellant and his partner were not compelling on the evidence presented for the reasons already outlined. In my judgement those circumstances as advanced before the FtTJ were not of such weight to demonstrate that when the interference with the appellant's family and private life when balanced against the public interest, that the consequences of removal were "unjustifiably harsh."

115. For the reasons given above, I am satisfied that the decision of the FtTJ did not make an error on a point of law and the decision stands.

Notice of Decision.

116. The decision of the First-tier Tribunal did not involve the making of an error on a point of law and therefore the decision stands.

Signed *Upper Tribunal Judge Reeds* Dated 4/3/ 2021

NOTIFICATION OF APPEAL RIGHTS

1. A person seeking permission to appeal against this decision must make a written application to the Upper Tribunal. Any such application must be received by the Upper Tribunal within the appropriate period after this decision was sent to the person making the application. The appropriate period varies, as follows, according to the location of the individual and the way in which the Upper Tribunal's decision was sent:

2. Where the person who appealed to the First-tier Tribunal is in the United Kingdom at the time that the application for permission to appeal is made, and is not in detention under the Immigration Acts, the appropriate period is 12 working days (10 working days if the notice of decision is sent electronically).

3. Where the person making the application is in detention under the Immigration Acts, the appropriate period is 7 working days (5 working days if the notice of decision is sent electronically).

4. Where the person who appealed to the First-tier Tribunal is outside the United Kingdom at the time that the application for permission to appeal is made, the appropriate period is 38 days (10 working days if the notice of decision is sent electronically).

5. A "working day" means any day except a Saturday or a Sunday, Christmas Day, Good Friday, or a bank holiday.

6. The date when the decision is "sent' is that appearing on the covering letter or covering email.